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of the Interstate Commerce Commission, and were made the basis of icing charges rendered by the railroad company in its freight or expense bills to the shippers. The railroad company was innocent. The question is whether the appellee is punishable under Section 20 (7) of the Interstate Commerce Act as a person who willfully makes a false entry in a record kept by a carrier.

The broad question is whether private persons and corporations acting for common carriers in performing an interstate transportation service which is subject to that Act thereby become amenable to the provisions of the Act and subject to punishment thereunder.

THE STATUTE

Section 20 (7) of the Interstate Commerce Act (c. 3591, 34 Stat. 584, 594, as amended by c. 193, 35 Stat. 648; U. S. C. Title 49, Sec. 20 (7)), which the indictment invokes, is as follows:

> (7) Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or ap-

proved by the Commission, shall be deemed guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars, or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment; Provided, That the Commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved.

Section 10 (1) of that Act (U. S. C. Title 49, Sec. 10 (1)) provides:

(1) That any common carrier subject to the provisions of this Act or, whenever such common carrier is a corporation, *any* director or officer thereof, or any receiver, trustee, lessee, agent, *or person acting for or employed by such corporation, who, alone* or with any other corporation, company, person, or party, *shall willfully do or cause to be done*, or shall willingly suffer or permit to be done, *any act, matter or thing in this Act prohibited or declared to be unlawful, or who shall aid or abet therein*, or shall willfully omit or fail to do any act, matter, or thing in this Act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this Act to be done not to be so done, or shall aid or

abet any such omission or failure, or shall be guilty of any infraction of this Act for which no penalty is otherwise provided, or who shall aid or abet therein, *shall be deemed guilty of a misdemeanor* * * *. [Italics supplied.]

STATEMENT

At the November Term, 1927, the Grand Jury for the Western District of Pennsylvania returned an indictment in seventy-five counts against the appellee, charging the making of false entries in records kept by a railroad common carrier, and the aiding, abetting, and procuring such false entries to be made by the carrier, in violation of Section 20 (7) of the Interstate Commerce Act. A motion to quash the indictment was sustained, and judgment entered accordingly on May 5, 1928, from which this appeal was prosecuted on May 26, 1928, direct from the District Court under the Act of March 2, 1907, c. 2564, 34 Stat. 1246; U. S. C. Title 18, Sec. 682.

Appellee is a Delaware corporation, with an office and place of business at Pittsburgh, Pennsylvania. The Pennsylvania Railroad Company, by its tariffs and schedules duly published and filed with the Interstate Commerce Commission, offered and held itself out to perform for shippers of perishable commodities the service of refrigeration or icing of cars containing such commodities, at and for the rates and charges named in such schedules. By contract executed by them on May 1, 1925, the appellee undertook and agreed to perform for and on behalf

of the Railroad Company the refrigeration service described in those schedules, and, pursuant to the contract, performed that service in connection with the interstate shipments described in the several counts of the indictment, and rendered to the Railroad Company a report purporting to show the quantity of ice placed in the bunkers of each car. These reports were written by the appellee and are designated "Fruit Growers Express Company Form AD-54." The reports, according to the facts alleged in the indictment, were willfully falsified by appellee to the extent that it willfully wrote therein false figures concerning the quantity of ice which it had placed in the bunkers of the cars, instead of stating the correct quantity.

The icing or refrigeration reports written and furnished by the Express Company to the Railroad Company were placed by the latter in its files and, pursuant to an order of the Interstate Commerce Commission issued under Section 20 (7) of the Interstate Commerce Act, are kept and preserved in its files for a period of three years.

These reports were accepted by the Railroad Company as stating the true and correct quantity of ice placed in the cars, and from them the Railroad Company copied into its freight bills the false statements of the quantity of ice represented as having been furnished, resulting in the collection of an improper and incorrect charge from the consignee of the shipment.

The charge in counts 1 to 50, inclusive, of the indictment, is that the appellee made false entries in certain records, namely, the icing reports, kept by the Railroad Company.

Counts 51 to 65, inclusive, charge that by falsifying the icing reports appellee made and caused to be made false entries in freight bills kept by the Railroad Company.

The Government does not urge counts 66 to 75, inclusive, charging that appellee aided, abetted, and procured the making of false entries in the freight bills, and submits no argument in support of the validity of those counts.

Each count of the indictment involves a separate carload shipment of a perishable commodity, and the falsification by appellee of a record kept by the Railroad Company concerning the quantity of ice placed by appellee in the bunkers of the car.

The allegations of counts 1 (R. 1) and 51 (R. 43), only are described herein, inasmuch as those two counts, respectively, are typical of the two groups of counts here involved.

Count 1

After alleging that the Railroad Company is a common carrier, subject to the Interstate Commerce Act, Count 1 alleges in paragraph 2 that the Railroad Company published and filed with the Interstate Commerce Commission schedules and tariffs of refrigerator rates and charges which provided, among other things, (a) that bunkers of

refrigerator cars containing perishable commodities and transported by it for delivery at Pittsburgh, Pennsylvania, would be inspected each day from time of arrival until the consignee began unloading the cars; and (b) that when required, additional ice sufficient to fill the bunkers would be placed therein at the rate and charge to the consignee of $4.00 for each ton of 2,000 pounds, except that when the bunkers were less than three-fourths full of ice upon arrival at Pittsburgh, the bunkers would then be iced to capacity without charge for the arrival icing, and (c) that the arrival icing charge of $4.00 per ton was exclusive of and in addition to the rates charged for the transportation of such perishable commodities.

Paragraph 3 alleges that the appellee is a Delaware corporation engaged, among other things, in inspecting, icing, and reicing refrigerator cars containing shipments of perishable commodities transported by the Railroad Company for delivery at Pittsburgh, that service being performed by appellee for and on behalf of the Railroad Company pursuant to the terms of a contract executed by them on May 1, 1925, whereby the appellee agreed to perform the inspection and icing service which the Railroad Company, by and through the means of its published schedules and tariffs agreed and undertook to perform in connection with such shipments.

Paragraph 4 alleges that the appellee, as required by the Railroad Company, made and furnished

written reports of the quantity of ice placed by it in the bunkers of the cars for and on behalf of the Railroad Company at Pittsburgh, which reports were received and kept by the Railroad Company as the true and correct reports of the quantity of ice so furnished; and that those were the only reports and records from which the Railroad Company could prepare and render to consignees of shipments at Pittsburgh statements and bills for ice furnished in accordance with its published tariffs and schedules.

Paragraph 5 refers to a specific carload shipment transported by the Railroad Company to Pittsburgh and alleges that the appellee, after having knowingly placed only 1,800 pounds of ice in that car, willfully and falsely stated in the report that it had placed 2,800 pounds of ice in the car, and delivered the report to the Railroad Company with the intent that it should accept such false weight shown therein as the correct weight of the ice placed in the car.

Count 51

This count incorporates by reference the first four paragraphs of count 1 and alleges that the appellee acting pursuant to the terms of the contract mentioned above, willfully made and caused to be made a false entry in a freight bill kept by the Railroad Company, by the device and means of falsely stating in the written icing report that it had placed 3,000 pounds of ice in a car when it had

placed only 1,000 pounds in the car, well knowing that the Railroad Company would, as was its established custom, accept and rely upon the icing report as containing a true and accurate statement of the quantity of ice placed in the car, and would render its freight bill based upon the information set forth in the report.

SPECIFICATION OF ERRORS

The District Court erred:

I. In holding and adjudging that "the Interstate Commerce Act, on which the indictment is based, applies only to common carriers," and that, therefore, appellee, a noncarrier corporation, is not chargeable with a criminal offense under that Act "for furnishing to a common carrier false data from which the carrier's accounts are made, without averment and proof of collusion between the common carrier and the noncarrier corporation with respect thereto."

II. In deciding and holding that the term "records kept by a common carrier," as used in the statute, means records written or "made up" by the carrier, and that, therefore, the icing reports described in counts 1 to 50, inclusive, made up and written by the appellee and furnished by it to the Railroad Company could not be construed as records "kept by the carrier in accordance with the Interstate Commerce Act."

III. In holding that because the Railroad Company actually wrote the falsified freight bills, though relying upon the truth of the appellee's

entries in the icing reports, the appellee is not indictable for making and causing to be made false entries in the freight bills described in counts 51 to 65, inclusive.

IV. In sustaining the motion to quash the indictment.

SUMMARY OF ARGUMENT

1. Refrigeration or icing of interstate shipments is a transportation service, which, by Section 1 of the Interstate Commerce Act, is made subject thereto, and by performing that service appellee, though not a common carrier, subjected itself to the statutes regulating and protecting the service.

2. Section 20 (7) of the Act condemns and punishes "any person" who makes false entries in any record kept by a common carrier; hence the District Court erred in holding that it applies only to common carriers and their officers, agents and employees. The statute was intended to cover a person acting for the carrier, whether as an employee *or* as a contractor, and this is shown by Section 10 (1), which includes persons acting for as well as those employed by carriers.

3. The falsified icing reports described in counts 1 to 50 are records "kept" by the Railroad Company within the meaning of Section 20 (7) and preserved in its files for three years in compliance with the order of the Interstate Commerce Commission. It is immaterial that the appellee, and not the Railroad Company, wrote the records so kept, and the District Court erred in holding to the contrary.

4. Through the device and means of making false entries in the icing reports, which were accepted in good faith and relied upon by the Railroad Company in writing its freight bills, the appellee falsified the freight bills described in counts 51 to 65, inclusive, within the meaning of Section 20 (7). We concede that the position of the United States in these counts is weaker than in Counts 1 to 50, wherein appellee itself actually wrote the false icing reports, whereas the freight bills based upon the false icing reports were written by the Railroad Company.

5. Collusion between the carrier and "any person" who makes a false entry in any record kept by the carrier is not an element of the misdemeanor created by Section 20 (7); therefore, the District Court erred in holding that the appellee was not indictable for furnishing the false icing reports to the Railroad Company without averment and proof of collusion between them.

ARGUMENT

I

REFRIGERATION IS A TRANSPORTATION SERVICE REGULATED BY THE INTERSTATE COMMERCE ACT, AND IN PERFORMING THAT SERVICE APPELLEE WAS A PERSON EMPLOYED BY AND ACTING FOR THE RAILROAD COMPANY; AS SUCH IT WAS BOUND TO OBSERVE THE STATUTES REGULATING THE SERVICE

It is not contended by the Government that appellee is a common carrier subject to the Interstate Commerce Act. *Chicago Refrigeration Co.* v. *Interstate Commerce Commission*, 265 U. S. 292.

However, by the provisions of Section 1, paragraphs (3) and (4) of that Act, refrigeration or icing of cars containing shipments of commodities transported in interstate commerce is a transportation service which common carriers are under duty to provide and furnish upon reasonable request.

Paragraphs (3) and (4) of that Section provide (41 Stat. 474):

> (3) * * * The term "transportation" as used in this Act shall include * * * all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the * * * refrigeration or icing * * * of property transported. * * *
>
> (4) It shall be the duty of every common carrier subject to this act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor. * * *

In *Atchison Railway Co.* v. *United States*, 232 U. S. 199, this Court said at page 215 (quoting from 20 I. C. C. 116):

> It is the duty of the carrier to furnish refrigeration upon reasonable demand.

That service being itself a transportation service which the common carrier is under statutory duty to peform, and brought specifically within the statutes regulating transportation in interstate commerce, it follows that those who perform the service of necessity subject themselves to the statutes

which regulate the service. The fact that the Railroad Company did not perform the refrigeration service does not remove the service from the jurisdiction of the statutes.

In *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, this Court, in holding that the elevation of grain in course of interstate movement was a transportation service, recognized the right of a carrier to employ another person or corporation to perform the service. At page 47 it said:

> As the carrier is required to furnish this part of the transportation upon request he could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owning it.

Congress has regulated *commerce;* it has regulated transportation because it is commerce; and its regulations bind those who perform interstate transportation services because they are engaged in commerce. Obviously, the very purpose of the legislative body to regulate commerce would be defeated if the regulatory statutes had no application to those engaged in commerce. The appellee apparently claims the privilege of acting for carriers in performing a transportation service upon an interstate shipment which is regulated by the Interstate Commerce Act, receive its compensation therefor from the carriers, and yet be not bound by or subject to the regulations which govern and protect the interstate shipment. This it can not do. *Munn* v. *Illinois*, 94 U. S. 113.

In *Spencer Kellogg & Sons* v. *United States*, 20 F (2d), 459 (certiorari denied, 275 U. S. 566), the Circuit Court of Appeals, Second Circuit, held that a private corporation which elevated grain in course of interstate transportation for a common carrier pursuant to previous arrangements or agreements violated the Elkins Act in refunding to shippers a portion of the elevation allowance. In holding that the elevator company was subject to that Act the Court said, at page 461:

> Congress has the power, under the Constitution, to regulate interstate commerce, and therefore the action of persons who are engaged in it because of that fact. *Gibbons* v. *Ogden*, 9 Wheat. 1, 76. Agents or persons acting for a carrier are bound by these regulations. *New York Central Railroad* v. *United States*, 212 U. S. 481.

II

SECTION 20 (7) OF THE INTERSTATE COMMERCE ACT IS NOT LIMITED TO COMMON CARRIERS AND THEIR EMPLOYEES, BUT INCLUDES AND PUNISHES ALL PERSONS AND CORPORATIONS WHO COMMIT THE ACT THEREIN DECLARED TO BE UNLAWFUL

It seems clear that by using the words "any person" [1] this section was not designed to restrain or

[1] The word "person" in Federal legislation includes corporations. *United States* v. *First National Bank of Anamoose*, 190 Fed. 336, 346; *Union Pacific Coal Co.* v. *United States*, 173 Fed. 737, 739; *Dressel* v. *North State Lumber Co.*, 107 Fed. 255, 256; *United States* v. *Union Supply Co.*, 215 U. S. 50, 54; *United States* v. *Amedy*, 11 Wheat. 392, 412.

punish merely common carriers and their office employees who might make false entries in records kept by the carrier, but that it was the legislative intent to make it unlawful (1) to make a false entry in such records and (2) to provide punishment for everyone who committed the unlawful offense. If Congress had intended, as was held by the District Court, that this section apply only to common carriers and their directors, officers, agents, or employees, then apparently such persons would have been specifically named, as in other sections of the Act. See Secs. 15 (11), 16 (8), and 20a (11).

Similar words appear in Section 1 of the Elkins Act (c. 708, 32 Stat. 847; c. 3591, 34 Stat. 584, 588; U. S. C. Title 49, § 41), wherein it is declared that "it shall be unlawful for any person, persons, or corporation" to give or receive a rebate, etc., and in the penal clause, that "every person or corporation, whether carrier or shipper," who shall give or receive a rebate shall be deemed guilty of a misdemeanor. In *Spencer Kellogg & Sons* v. *United States*, *supra*, the Circuit Court of Appeals held that the words "any person" and "every person" included *all persons* whose intended acts resulted in the thing forbidden by that Act, and that those words were not to be restricted in their application even by the words "whether carrier or shipper" used in the penalty provision. At page 461 the court said:

> The act concerns itself with preventing concessions and rebates with respect to inter-

> state transportation of property, and not with carriers, shippers, their agents, or anyone else, unless and until their acts result in the accomplishment of that which the statute forbids. It was not intended and does not permit anyone else, other than shippers and carriers, to grant rebates or concessions.

Section 10 (1) of the Interstate Commerce Act throws light on the legislative intention. That section provides punishment for all conduct prohibited by the Act for which no penalty is otherwise provided, and since a penalty is otherwise provided in Section 20 (7), Section 10 (1) has no direct application here, but its words show that Congress intended by the Act to punish those acting for common carriers, although the relation of master and servant does not exist, for, after covering the cases of officers and servants, it includes a " person acting for *or* employed by such corporation."

Any construction of Section 20 (7) which attempts to limit or restrict its application exclusively to common carriers and their immediate officers and agents overlooks both the letter and the purpose of that statute.

In *United States* v. *Tippitt*, 298 Fed. 495, the District Court at page 500, said of this section:

> The statute is highly penal, and, while *the evident purpose of the entire legislation was to preserve every record, so that an inspection thereof could be made at any time that the supervising body might think proper*, yet a court is not warranted in placing a

> strained, unusual or unknown meaning upon well-known and easily understood words and phrases. (Italics supplied.)

The purposes of Section 20 of the Act fully appear from this Court's decision in *Int. Com. Comm.* v. *Goodrich Transit Co.*, 224 U. S. 194, in which the authority of the Interstate Commerce Commission under that section to prescribe and require the keeping of a uniform system of accounts by common carriers was upheld. At pages 211 and 213, respectively, the Court said:

> We think this section contains ample authority for the Commission to require a system of accounting as provided in its orders and a report in the form shown to have been required by the order of the Commission. It is true that the accounts required to be kept are general in their nature and embrace business other than such as is necessary to the discharge of the duties required in carrying passengers and freight in interstate commerce by joint arrangement between the railroad and the water carrier, but the Commission is charged under the law with the supervision of such rates as to their reasonableness and with the general duty of making reports to Congress which might require a knowledge of the business of the carrier beyond that which is strictly of the character mentioned. If the Commission is to successfully perform its duties in respect to reasonable rates, undue discriminations and favoritism, it must be informed as to the business of the carriers by a system of ac-

counting which will not permit the possible concealment of forbidden practices in accounts which it is not permitted to see and concerning which it can require no information. It is a mistake to suppose that the requiring of information concerning the business methods of such corporations, as shown in their accounts, is a regulation of business not within the jurisdiction of the Commission, as seems to be argued for the complainants. The object of requiring such accounts to be kept in a uniform way and to be open to the inspection of the Commission is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the act that it may properly regulate such matters as are really within its jurisdiction. Further, the requiring of information concerning a business is not regulation of that business.

* * * * *

We think the act should be given a practical construction, and one which will enable the Commission to perform the duties required of it by Congress, and, conceding for this purpose that the regulating power of the Commission is limited so far as rates are concerned to joint rates of the character named in § 1, it is still essential that to enable the Commission to perform its required duties, even with respect to such rates, and to make reports to Congress of the business of carriers subject to the terms of the act, it

should be informed as to the matters contained in the report. Congress, in § 20, has authorized the Commission to inquire as to the business which the carrier does and to require the keeping of uniform accounts, in order that the Commission may know just how the business is carried on, with a view to regulating that which is confessedly within its power.

That a person who is not an employee of the carrier who keeps the record is chargeable with the offense created by Section 20 (7) is the holding of the Circuit Court of Appeals, 4th Circuit, in *Kennedy* v. *United States*, 275 Fed. 182. Kennedy was convicted upon an indictment brought under that section charging (a) wilfully making false entries; (b) wilfully neglecting and failing to make full, true and correct entries, and (c) wilfully altering and falsifying records kept by an interstate carrier. The charge of wilfully neglecting and failing to make full, true and correct entries involved records kept by the Charleston Terminal Company, a common carrier, while Kennedy was an employee of the Southern Railway Company, which delivered carloads of hay and corn to the Terminal Company for switching to side tracks of consignees. Kennedy's duty was to issue directions as to the disposition of cars and in that connection to send a "manifest" or memorandum to the Terminal Company indicating whether a car was billed "straight" or "order notify," i. e., whether the car was to be delivered to the consignee at once or only

upon presentation of the bill of lading. He wilfully failed and neglected to state on the manifest that certain cars were billed "order notify." The original of the manifest was transmitted to the Terminal Company and by it kept in its files. This, the court held, constituted the wilful neglect and failure to make true and correct entries in a record kept by the Terminal Company. At page 185 the court said:

> The bill of lading and the record book in the defendant's office showed that the shipments were order notify. The charge in the seventh count and the proof was that car No. 28736 was consigned order notify, and was so entered on the waybill and on the car book kept by Kennedy. In the memorandum or manifest sent by Kennedy officially to the terminal company to indicate the car and whether it was free or order notify, and to control the terminal company in handling the car, he deliberately and intentionally omitted the words "order notify." This was beyond all dispute willful neglect and failure to make a full, true, and correct entry of facts appertaining to the carrier's business of handling the shipment. Hence in any view of the law and the facts there was no possible escape from conviction on the seventh count, and conviction on that alone would support the sentence.

It was also held that Kennedy's acts constituted a further violation of Section 20 (7), for the reason that carbon copies of the incorrect and incomplete

manifests were kept by the Southern Railway. On this point the court said, at pages 185–186:

> There is, however, no ground for the contention that the memoranda or manifests kept by Kennedy when he sent the originals to the terminal company were not records or memoranda of the carrier. On the contrary, we think on Kennedy's own testimony the District Judge was right in charging the jury that they were records of the carrier. He testified that they were not included in any inspection, that they remained in his possession, and that he destroyed them when he saw fit. But he also testified that they were devised by him as car clerk as a part of "the system" of his office, for his information and convenience in the transaction of the carrier's business. He did not deny the testimony of the government witnesses that these manifests or memoranda were actually found among the records of the Southern Railway's freight office. There was also uncontradicted testimony that they were usually kept, and that they were essential as copies of the originals sent to the terminal company. Indeed, it is evident these copies were essential memoranda for the use of the railway company as checks on the terminal company. When, therefore, the defendant willfully omitted the notation "order notify" on the original sent the terminal company and entered it on the purported copy retained, and entered on the original "One car B. L. surrendered up here chgs. paid," or the words "B. L. up here," and omitted them

> from the purported copies retained, he willfully made false entries, and willfully neglected to make full, true, and correct entries of facts appertaining to the business of the carrier in records kept by the carrier.

III

THE FALSIFIED ICING REPORTS DESCRIBED IN COUNTS 1 TO 50 ARE RECORDS "KEPT" BY THE RAILROAD COMPANY WITHIN THE MEANING OF SECTION 20 (7), AND PRESERVED IN ITS FILES FOR THREE YEARS, IN COMPLIANCE WITH THE ORDER OF THE INTERSTATE COMMERCE COMMISSION, AND IT IS IMMATERIAL WHETHER THE RAILROAD COMPANY COMPILED OR WROTE THE RECORDS SO KEPT

The District Court held that (R. 80):

> While Counts 1 to 50 charge the defendant with making false entries in records kept by a common carrier, the averments of fact affirmatively show that the false entries were made in the records kept—that is, made up by the defendant.

Thus, the court holds that records *kept*, within the meaning of that section, are records written or "made up" by the carrier. This interpretation ignores not only the purpose of that section but also the ordinary meaning of the word "kept." According to Webster's New International Dictionary "kept" is the past participle of the word "keep," which is there defined, "to preserve or maintain." The definition of the word "keep" as shown in Funk & Wagnalls' New Standard Dictionary is, "to have and retain in one's control or possession."

That the term "any record or memorandum kept by a carrier," as used in Section 20 (7) does not mean a record written or made up by the carrier readily appears when consideration is given to the purpose for which that section was enacted.

In *United States* v. *Tippitt, supra,* the court stated that *the evident purpose of that section was to preserve every record, so that an inspection thereof could be made at any time the Commission might think proper.* This statement of the purpose of that section is in harmony with the apparent interpretation of it by the Interstate Commerce Commission which, though not conclusive, is entitled to great weight.

> *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 244 U. S. 336.

For example, the Commission in its regulation of telegraph companies has issued its Conference Ruling No. 460 as follows:

> 460. TELEGRAMS AND CABLEGRAMS.—The practice by telegraph and cable companies of returning to patrons the *original telegrams or cablegrams* in support of their bills is unlawful. Such documents must be retained in conformity with the regulations of the Commission governing the destruction of records of telephone, telegraph, and cable companies. [Italics supplied.]

It is common knowledge that original telegrams and cablegrams are written by the persons who send them, and not by the telegraph or cable companies thus required to keep them.

By its order issued June 1, 1914, which, with excerpts, is printed in the Appendix hereto, the Commission requires that icing reports or records of cars iced and ventilated be kept by common carriers for a period of three years, and that records and reports of over-collection of freight and other charges, including icing charges, be maintained for a period of six years. The authority to issue such an order is granted the Commission in the proviso of Section 20 (7). Among the records which the Commission describes in that order and requires carriers to keep and preserve in their files for varying periods, are several records which, by the very nature of the transactions giving rise to the writing of those records, are not written by carriers. Such records include the following:

Description of records	Period to be retained
Consignors' shipping orders, consignors' shipping tickets * * *	6 years.
Instructions for delivery at consignees' stations	3 years.
Claim papers, all papers relating to overcharge, loss and damage, personal injury, fire, and other claims * * *	6 years after settlement or rejection.
Bids and offers for the sale or purchase of materials and supplies	3 years.
Orders from consignees for delivery of freight	6 years.
Orders for the reconsignment of freight	6 years.
Correspondence and records thereof relating to subjects listed * * *	For the period prescribed for the records to which the correspondence relates.

The interpretation of Section 20 (7) by the District Court is directly contrary to the decision of the Circuit Court of Appeals in *Kennedy* v. *United States, supra*, for there it was held that Kennedy, although an employee of the Southern Railway,

willfully failed and neglected to make true and correct entries in records kept by the Charleston Terminal Company, another common carrier. In other words, the court held that the manifests written by Kennedy and furnished to the Terminal Company were records "kept" by the latter within the meaning of Section 20 (7).

If the word "kept" as used in this section means and refers only to records written or made up by carriers and their office employees, it is obvious that the purpose of Section 20, to establish, maintain, and preserve a uniform and informative system of accounts, records, and memoranda in order that the Commission may, whenever necessity arises, inspect and investigate the transactions of carriers subject to the Act, can be completely thwarted by the railroads through the device of employing independent corporations to perform certain transportation services which the carriers are required to furnish. This case illustrates the means of defeating the purpose of the statute. That is to say, the Railroad Company is entitled to employ appellee to perform the icing service; the appellee, and it only, is in a position to make true reports of the quantity of ice used; the appellee itself is not a common carrier subject to the Act; therefore, it may, if the decision of the District Court is correct, falsify or destroy the icing records at its pleasure, since, as indeed the court held, the Commission has no control whatever over those records.

Under the District Court's decision, even the Railroad Company may destroy, mutilate, or falsify, at its pleasure, all records kept by it if written by other persons and corporations. That such view is untenable is obvious when applied to "shipping orders" written by shippers and kept by the carrier for six years. From the shipping order the carriers prepare the waybill covering the shipment, and collect the amount of freight charges due according to the description of the commodity as shown in the shipping order. In short, all records concerning the shipment relate back to the shipping order and depend upon it for accuracy.

IV

THROUGH THE DEVICE OF MAKING FALSE ENTRIES IN THE ICING REPORTS, WHICH WERE ACCEPTED IN GOOD FAITH AND RELIED UPON BY THE RAILROAD COMPANY IN WRITING ITS FREIGHT BILLS, APPELLEE FALSIFIED THE FREIGHT BILLS DESCRIBED IN COUNTS 51 TO 65, INCLUSIVE, WITHIN THE MEANING OF SECTION 20 (7).

This contention may not be so easily defended as that respecting the false icing reports, because the latter were actually made by the appellee, while the freight bills were made by the carrier.

In counts 51 to 65, inclusive, appellee is directly charged, as principal, with the falsification of freight bills (also known as "expense bills" for freight) written by the Railroad Company, the originals being submitted to consignees of the ship-

ments and copies thereof being kept by the Railroad Company in its files for six years. But the false statements therein written were copied from the false icing reports written by the appellee, and accepted and relied upon by the Railroad Company as containing true and correct statements of the quantity of ice furnished. It will be seen from the very nature of the arrangement between appellee and the Railroad Company that the appellee and the reports furnished by it constitute the only possible source from which the Railroad Company could obtain any information concerning the quantity of ice placed in the cars. This, the indictment charges, the appellee well knew, and further that the Railroad Company did accept, as it must, and rely upon the statements contained in the icing reports, and prepared and rendered its freight bills based upon that information. Consequently, it readily appears that the truth and accuracy of the freight bills, in so far as they pertained to icing charges, were wholly dependent upon and entirely within the control of appellee.

Section 20 (7) comprehends the falsification of records kept by a carrier through and by means of devices other than the simple method of the writing by such person of false entries directly into the freight bills. Indeed, it appears from the language of that section that Congress had in mind not only the simple and ordinary means by which such records could be falsified, but also *any* and *all* other

means which could be employed to accomplish the thing forbidden. The language is:

> Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, *or by any other means or device falsify* the record of any such account, record, or memoranda, * * *. (Italics supplied.)

This Court has frequently dealt with and construed the word "device" as used in the Elkins Act, and has as frequently held that it includes, condemns, and punishes every method to which persons and corporations have resorted to accomplish the result forbidden by that Act. For example, in *United States* v. *Koenig Coal Company*, 270 U. S. 512, it was held that a shipper could not escape punishment under that Act by resorting to the device of trickery and deceit to obtain concessions from a carrier which acted innocently and without knowledge that it granted the concession. In *Armour Packing Co.* v. *United States*, 209 U. S. 56, a case involving violations of the Elkins Act, the Court construed the word "device" to include the making of a private contract rate which was less than the published tariff rate for the transportation of property. At page 71 it is said:

> A device need not be necessarily fraudulent; the term includes anything which is a plan or contrivance. Webster defines it to be "that

> which is devised or formed by design; a contrivance; an invention; a project," etc.

In *Grand Rapids & Indiana Railway Co.* v. *United States*, 212 Fed. 577 (C. C. A. 6th Cir.), which involved rebates paid by a carrier in violation of the Elkins Act, the Court overruled the contention that there was a fatal variance between allegations of the indictment and the evidence, and said of the contention, at page 581:

> It also fails to give due effect to the comprehensive provision of the statute, which forbids employment of "any rebate, concession or discrimination," or of "any device whatever," respecting the transportation of property "at a less rate than that named in the tariffs published and filed by such carrier."

If the word "device," as used in the Elkins Act, includes any and every means by which the thing forbidden may be accomplished, we submit that the words of Section 20 (7), "or by any other means or device," must be similarly, if not identically, construed. Unless these words include the resort to any and all other methods of falsifying records kept by a carrier, in addition to the simple act of a person writing with his own hand a false entry in a record so kept, they must of necessity be read out of the statute.

The District Court apparently has overlooked the purpose of Section 20 (7) and the result which it aims to prevent. One of the purposes of the statute

is stated by the Circuit Court of Appeals in *Kennedy* v. *United States, supra,* p. 183, as follows:

> First, that all accounts, records, and memoranda of the carrier, whether prescribed by the Commission or not, should be true and correct.

Certainly that purpose can not be accomplished under the District Court's interpretation, for, as construed by it, the Railroad Company necessarily goes acquit, for it did not willfully make the false entries in the freight bills; the appellee also goes acquit because it did not write the freight bills, although with obvious willfulness and evil intent it did cause and procure, through trickery and deceit, the making of false entries in the freight bills. This incongruity results: The act described and made unlawful by the statute has been committed, and the prohibited result accomplished by the appellee; nevertheless, the statute has not been violated.

In *United States* v. *Koenig Coal Company, supra,* speaking of an indictment under the Elkins Act, this Court said, at page 519:

> It would be contrary, therefore, to the general intent of the law to restrain the effect of the language used so as not to include acts exactly described, when they clearly effect discrimination and inequality.

And in *Spencer Kellogg & Sons* v. *United States, supra,* the Circuit Court of Appeals, in overruling the contention that the payment of a rebate violated the Elkins Act only when made by or with the cooperation of a common carrier, said, at page 461:

> The test to be applied in determining whether the Act is violated is whether the terms of the statute include the acts committed. Whether the person committing the act is a shipper or carrier is not determinative. *United States* v. *Koenig Coal Co.*, 270 U. S. 512.

Section 20 (7), like the Elkins Act, is a prohibitory statute enacted to subserve a definite purpose and to accomplish a certain result, namely, the preservation by common carriers of true and correct records. Appellee, having committed the acts exactly described by that section, and having by that means accomplished the forbidden result, is clearly amenable to the punishment therein provided. There is no basis for the contention that it escapes merely because it has resorted to trickery and deceit.

V

THE INDICTMENT IS NOT INVALID FOR FAILURE TO ALLEGE COLLUSION BETWEEN APPELLEE AND THE RAILROAD COMPANY, FOR COLLUSION OR CONSPIRACY IS NOT AN ELEMENT OF THE CRIME DEFINED BY SECTION 20 (7)

The District Court has apparently reached the erroneous conclusion that the only method by which Section 20 (7) can be violated by any person, other than the carrier, is by such person re-

sorting to collusion with the carrier. It holds (R. 80) that—

> Third. A noncarrier corporation acting as an individual contractor is not chargeable with a criminal offense under the interstate commerce act, as amended, for furnishing to a common carrier false data from which the carrier's accounts are made, without averment and proof of collusion between the common carrier and the noncarrier corporation with respect thereto. * * *

That such conclusion is erroneous readily appears from a casual reading of the statute, which nowhere refers to collusion, conspiracy or joint action. On the contrary, it contemplates individual action, for it declares that *any person* who wilfully makes a false entry in a record kept by a carrier shall be deemed guilty of a misdemeanor. There is no question of collusion or joint action between appellee and the railroad company. The question is whether the acts of appellee are those described by the statute. In *United States* v. *Koenig Coal Co., supra*, this Court overruled the contention that the offense of receiving concessions, within the meaning of the Elkins Act, could not be committed without guilty knowledge and collusion of both the shipper and the carrier. At page 519, the Court stated that as practical men

the legislators knew that this was the way in which violations of the law were most likely to occur, and said:

> But this does not at all justify the conclusion that Congress in enacting the Elkins law intended to limit the offenses described in it to cases of collusion, if otherwise the acts charged came within the words of the statute.

A similar contention was overruled by the Circuit Court of Appeals in *Spencer Kellogg & Sons* v. *United States*, *supra*, with the statement, at page 461, that:

> Congress did not intend to limit the offense described in it [the Elkins Act] to cases of collusion between the carrier and the shipper. What was done by the plaintiff in error is not in dispute, and therefore the question is whether what was done constitutes an offense by this plaintiff in error, even though it were not established to have been done in collusion with a carrier or with its knowledge or consent. The law was intended to reach either individuals or corporate entities who contribute knowingly and understandingly to a rebate or concession by any manner or device, and the relation which the culprit bore to the carrier is not necessary as a foundation upon which to rest responsibility.

CONCLUSION

The judgment of the District Court should be reversed and the cause remanded with directions to overrule the motion to quash the indictment.

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